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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF

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Citations to Opinions Below

The opinion of the United States District Court for the District of New Mexico is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit affirming the District Court's decision is reported at 404 F.2d 601 (10th Cir. 1968).

Jurisdiction

The Order of the United States Court of Appeals for the Tenth Circuit affirming the Order of the United States District Court for the District of New Mexico was entered on December 17, 1968. On application for extension of time to file Petition for Writ of Certiorari on March 13, 1969, an Order Extending Time to File Petition for Writ of Certiorari was entered extending the time for filing said Petition to and including April 16, 1969. The Petition for Writ of Certiorari was granted on June 23, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

(1) Whether the decision of *United States* v. *Jackson* should be given retroactive application to guilty pleas under the Federal Kidnaping Act entered prior to the effective date of that decision.

(2) If the decision in *United States* v. *Jackson* is to be given retroactive effect, should the test to determine the voluntariness of guilty pleas under the Federal Kidnaping Act be whether the selective death penalty provision of the Act "needlessly encouraged" a guilty plea?

(3) Whether the selective death penalty provision of the Federal Kidnaping Act "needlessly encouraged" Petitioner's guilty plea to a kidnaping indictment, thereby discouraging the exercise of his right not to plead guilty, in violation of the Fifth Amendment, and deterring the exercise of his right to demand a jury trial, in violation of the Sixth Amendment.

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence (sic) to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence (sic).

Statutes:

United States Code Annotated

Title 18, Section 1201(a):

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized,

confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Title 28, Section 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to

render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Statement of the Case

On January 27, 1959, Robert M. Brady, hereinafter referred to as "Petitioner", was indicted by the grand jury of the United States District Court for the District of New Mexico, for violation of 70 Stat. 1043, 18 U.S.C. 1201, commonly referred to as the "Federal Kidnaping Act" (A. 13). It was charged in the indictment that, on or about Janu-

ary 18, 1959, Petitioner and one Alfonso Pedro Tafoya did unlawfully seize, kidnap, hold and abduct another person; that they knowingly caused the victim to be transported in interstate commerce; and, that said *victim was not liberated unharmed.* (*Ibid.*) Alfonso Pedro Tafoya was indicted with the Petitioner under the same indictment. (*Ibid.*)

On January 28, 1959, Petitioner and Tafoya were arraigned in the United States District Court before the Honorable Carl A. Hatch, United States District Judge, now deceased, and both defendants entered pleas of not guilty (A. 23-25). Thereafter, on April 30, 1959, both defendants were again brought before Judge Hatch, and they changed their pleas from not guilty to guilty (A. 26-28). On May 8, 1959, defendants came before Judge Hatch for sentencing and were each sentenced to fifty years imprisonment (A. 29-32). The Petitioner was thereafter incarcerated in Leavenworth Penitentiary (A. 39). His sentence of fifty years imprisonment was reduced to thirty years by executive clemency (A. 46).

On September 20, 1967, Petitioner filed in the United States District Court for the District of New Mexico a "Motion to Vacate Sentence and Collaterally Attack Judgment Pursuant to Title 28, Section 2255, United States Code, as Annotated" (A. 4-20). Among the grounds stated in the motion was the allegation that his plea of guilty was coerced and not entered freely and voluntarily. The basis for the contention was the argument that the death penalty provision of 18 U.S.C., Sec. 1201(a), was unconstitutional, in that it coerced a guilty plea and deprived Petitioner of the free exercise of his right to a trial by jury, both in violation of the Fifth and Sixth Amendments to the Constitution of the United States. There were a number of

other grounds stated in the motion, but these are not at issue in this proceeding.

On December 14, 1967, a pre-trial conference was held on Petitioner's motion to vacate sentence (A. 36). At that time, the case of *United States* v. *Jackson,* 390 U.S. 570 (1968), was then pending before this Court. Petitioner's counsel suggested that the district court defer hearing on the motion until this Court had rendered a decision in the *Jackson* case. (*Ibid.*) The suggestion was rejected by the district court, and the motion came on for hearing before the district court on March 20, 1968. (*Ibid.*)

At the hearing, the evidence was that, after his plea of not guilty, and before his change of plea, Petitioner was in the Albuquerque City Jail; was then transferred to the Santa Fe Jail; and, was later transferred back to Albuquerque (A. 39, 41-43). After the entry of a plea of not guilty, he talked with his attorney on at least one occasion in Albuquerque and expressed a desire to continue to plead not guilty (A. 40). While Petitioner was in the Santa Fe Jail, he still persisted in his not guilty plea (A. 41-42). After returning to the Albuquerque City Jail from Santa Fe, he still desired to plead not guilty (A. 42-43). Petitioner testified further that between the time he entered the plea of not guilty and April 30, 1959, when he changed his plea, he had been reading the local newspapers, and he was aware from them that if he went before a jury on a plea of not guilty, the maximum sentence could be the death penalty (A. 48-49). Up until the time that he learned of his co-defendant's confession, however, he felt that he would be found innocent by a jury (A. 49).

Petitioner said that he first learned of Tafoya's confession when his mother went down to the Albuquerque

City Jail and told him that Tafoya was going to plead guilty (A. 47-48). The first time that he actually saw the confession was when he met with his co-defendant and all the attorneys, in a room in the Federal Courthouse (A. 43). The purpose of the meeting, according to Mr. Gilberto Espinosa, one of the attorneys involved, was "concerning the plea that Brady would enter". "Tafoya had . . . made up his mind and informed . . . [the attorneys] that he was ready to plead guilty" (A. 57). After Petitioner read the confession, which "definitely" incriminated him, he was "told that there was no defense" and "all . . . [he] could do was plead guilty, . . ." (A. 44). Petitioner felt at that point that he "had no choice but to plead guilty." (*Ibid.*) He felt that, with Tafoya intending to plead guilty, a jury would not believe him (A. 45). His attorney told him that if he went to trial before a jury, there was "a great possibility . . . that [he] would be given the death sentence" (A. 44). He therefore decided to plead guilty because of his "attorney, statements by Alfonso Tafoya, *the great risk of a death sentence*" (emphasis added) (A. 45). He did not believe that he was guilty when he so pled (A. 45), and he has never believed that he was guilty (A. 49). When he was questioned by the district court about the voluntariness of his plea, he "reluctantly" let it stand so as not to have it rejected (A. 45-46). The district judge apparently felt that there was something in the pre-sentence report which raised a question about the voluntariness of Petitioner's guilty plea, because the court further questioned Petitioner about the plea at the sentencing hearing (A. 29). Since that time, Petitioner has filed many motions to have his plea vacated, but only this one has been considered (A. 46).

Petitioner's mother testified that, prior to the time that he changed his plea from not guilty to guilty, she went down to the Albuquerque City Jail to see him, but could not get in because her visit wasn't during regular visiting hours (A. 38). She went around to the back of the jail into an alleyway and called for her son. (*Ibid.*) When he came to the cell window, she called up to him, "For God's sake, plead guilty. They are going to give you the death sentence" (A. 38, 47-48).

Petitioner's co-defendant, Alfonso Tafoya, testified that his attorneys "told" him to plead guilty (A. 52), because he would "get the death sentence if [he] was found guilty; that there was no alternative. . . ." (A. 53). He said that his attorneys told him that if he pled guilty, he would "get five to seven years." (*Ibid.*) He confirmed that Petitioner intended to persist in his plea of not guilty until a meeting with Tafoya and all of the attorneys some time prior to April 30, 1959 (A. 50-51, 53). At that meeting, Tafoya said that the attorneys discussed with him and the Petitioner the possibility of the death penalty. The attorneys "told [him] that [he] would get the death sentence if [he] pled not guilty and was found guilty; that [he] would get the death sentence", and that "scared" him (A. 54, 55).

The attorneys for both defendants also testified at the hearing on the motion. Mr. Gilberto Espinosa, the attorney for the co-defendant, Tafoya, also confirmed that, prior to the meeting of the defendants and their attorneys in the Federal Building, Petitioner indicated he did not want to plead guilty (A. 59), and that meeting was for the purpose of discussing Petitioner's plea (A. 57). He further testified that the attorneys did discuss with Petitioner the possibility of his receiving the death penalty if he persisted

in his plea of not guilty (A. 61). It was his opinion that Judge Hatch would not have heard the case without a jury on a plea of not guilty (A. 62). This opinion was concurred in by Petitioner's attorney (A. 73). In fact, Judge Hatch apparently said on at least one occasion that he would not allow Petitioner to go to trial without a jury. (*Ibid.*)

Petitioner's attorney, Mr. Robert H. LaFollette, stated that Petitioner was told that, if he went before a jury, he would be subject to the death penalty (A. 65-66). Judge Hatch had reminded them on "at least three occasions" of the death penalty, and it was "written up" in the newspapers that the death penalty would apply in any case where there was injury to the victim (A. 66). In a kidnaping case, with an "allied charge of rape", Mr. LaFollette said "that is certainly the most serious injury that I can think of." (*Ibid.*) He advised Petitioner that he "couldn't go before a jury" because "it would be almost sure conviction and a possible death penalty" (A. 74-75). "Under all the circumstances", he told Petitioner, "I believe you should plead guilty" (A. 65). Mr. LaFollette "felt very gratified" when Petitioner decided to change his plea "in that we saved him from a death penalty in my opinion" (A. 66). On cross-examination he stated that "it looked [sic] very difficult for him [Petitioner] before a jury" and that he "certainly had a feeling that he [Petitioner] would be convicted beyond a shadow of a doubt" (A. 70). He told this to Petitioner "several times". (*Ibid.*) Mr. LaFollette's opinion of the case was summed up in his comment that he had "never had one [a case] where the defendants had tied themselves up in a sack like they had in this one" (A. 64).

In addition to the foregoing testimony, Mr. LaFollette further testified that the district judge, Judge Hatch, had made numerous comments, both in and out of the presence of the Petitioner, about the death penalty if the Petitioner went before a jury (A. 72). Judge Hatch stated, at one point, "in open court that he thought he [Petitioner] might get the death penalty", and "that . . . is enough to put a lawyer on notice" (A. 70). Mr. LaFollette said that the comment of the judge was "deleted out" of the record before the Petitioner pled guilty. (*Ibid.*) On an apparently earlier occasion, in chambers, when the attorneys went to Judge Hatch to ask for a date for a hearing because they "thought" they would change the plea, Judge Hatch said: "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury" (A. 72). He said this to counsel on occasions previous to that as well. (*Ibid.*) The witness stated that the judge made the further comment that: "It is very likely that they will get the death penalty." (*Ibid.*) Mr. LaFollette reported these comments of the judge to the Petitioner, and, from the context, it is clear that these reports were made to the Petitioner before the Petitioner actually changed his plea from not guilty to guilty. (*Ibid.*) In addition, in open court, Judge Hatch also told the Petitioner that if he went before a jury, the death penalty could be imposed (A. 23), and, prior to accepting a formal guilty plea, he told Petitioner that, on a guilty plea, the court alone could not impose the death penalty (A. 27). He suggested that there was some authority for empaneling a sentencing jury, but it was his decision, to "relieve your minds of any suspense —that the [death] penalty should not be imposed in your case, nor should a jury be empaneled. . . ." (A. 27-28).

After hearing the evidence and the arguments of counsel, the district court denied Petitioner's motion (A. 89-92). The district court found that the death penalty provision of 18 U.S.C., Sec. 1201(a), was constitutional, basing its decision upon the case of *Robinson* v. *United States,* 264 F.Supp. 146 (W.D. Ky. 1967). It concluded, in effect, that because the statute was constitutional, Petitioner's claim that the statute coerced him into pleading guilty did not have any merit (A. 90). Having rejected, as a matter of law, and based upon the conclusion that the death penalty provision of the Federal Kidnaping Act was not unconstitutional, the claim of the Petitioner that his plea of guilty was coerced by fear of the death penalty, the district court went on to hold that Petitioner pled guilty because of the confession which his co-defendant had made. (*Ibid.*) The district court also rejected Petitioner's motion on the other grounds stated therein. The opinion concluded with a general finding that there was "no coercion of any kind" upon the Petitioner (A. 92).

Thereafter, on April 8, 1968, this Court decided the case of *United States* v. *Jackson, supra,* in which the death penalty provision of 18 U.S.C., Sec. 1201(a), was held unconstitutional on the grounds that it *needlessly encouraged* guilty pleas, which resulted in discouraging assertion of the Fifth Amendment right not to plead guilty, and deterred the exercise of the Sixth Amendment right to demand a jury trial. On April 11, 1968, Petitioner filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit, from the order of the district court denying his motion (A. 94).

On December 17, 1968, the Court of Appeals for the Tenth Circuit affirmed the decision of the district court (A. 98-100). The Court of Appeals pointed out that, although

this Court had found the death penalty provision of 18 U.S.C., Sec. 1201, unconstitutional after the decision of the district court had been rendered, that decision "recognized that the presence of the proscribed provision did not imply that every guilty plea [entered thereunder] was involuntary" (A. 99). It then went on to state that the finding of the trial court that the guilty plea was induced not because of the statute, but by reason of other matters, was supported by substantial evidence in the record. (*Ibid.*)

Summary of Argument

I.

United States v. Jackson Should Have Retroactive Application to Federal Kidnaping Act Guilty Pleas Entered Prior to the Date of That Decision.

A. It Is Implicit From the Language of *Jackson* That It Should Be Applied Retroactively.

Jackson was based upon the rationale that the selective death penalty provision of the Federal Kidnaping Act discouraged the Fifth Amendment right not to plead guilty and deterred exercise of the Sixth Amendment right to demand a jury trial. Therefore, such provision could result in involuntary guilty pleas. Since future guilty pleas could be involuntary if the selective death penalty provision were allowed to remain in the Act, it follows that some guilty pleas to charges under the Act, entered prior to *Jackson,* could have been involuntary. This Court has always held that involuntary guilty pleas are subject to collateral attack, even after final judgment has been entered. Therefore, logic requires that *Jackson* be given retroactive application.

B. *United States v. Jackson* Was a Declaration of the Unconstitutionality of a Federal Criminal Statute, and the Doctrine of Absolute Retroactive Invalidity Should Apply to Insure Protection of Individual Rights.

Jackson involved a declaration of the invalidity of a federal criminal statute. Prior decisions of this Court involving both civil and criminal statutes have held that an unconstitutional statute is not a law. It is void and its unconstitutionality dates from the time of its enactment. When a criminal statute is declared unconstitutional, prior convictions under the statute are a nullity. The rule is called "absolute retroactive invalidity". The only exception to the rule applies to civil statutes declared invalid after property rights have vested and such exception is not applicable here.

In order to insure protection of the rights of individuals who pled guilty to kidnaping charges prior to *Jackson*, justice demands that the rule of absolute retroactive invalidity apply to the declaration of the unconstitutionality of the selective death penalty provision of the Federal Kidnaping Act. The fact that only a portion of the statute was declared unconstitutional and severed does not affect the analysis. That invalid portion of the statute tainted the whole statute and created a situation in which it is possible, if not probable, that persons charged under the Federal Kidnaping Act, prior to *Jackson*, were faced with an illegal and unconstitutional dilemma, i.e., whether to plead not guilty and risk a death sentence, or to avoid any possibility of the death sentence by pleading guilty. The doctrine of absolute retroactive invalidity should be applied to determine whether any persons charged under the Act prior to *Jackson* were faced with such a dilemma, and,

if so, whether the fear of the death penalty in any way motivated guilty pleas.

C. Even If the Recent Decisions of This Court on Criminal Law Enforcement Procedures Were Applicable on the Retroactivity of *United States v. Jackson*, Under Those Decisions *Jackson* Should Be Applied Retroactively.

If prior decisions of this Court dealing with the retroactive application of decisions involving criminal law enforcement procedures are applicable to this case, those decisions require that *Jackson* be applied retroactively. Those decisions hold that the standards to be applied to determine whether an opinion should be applied retroactively are:

(1) The purpose to be served by the new standards;

(2) The extent of the reliance by law enforcement authorities on the old standards; and,

(3) The effect on the administration of justice of a retroactive application of the new standards.

The most important of the above considerations is the purpose to be served by the new standards. If the purpose of a decision is to insure a fair trial and a reliable verdict, as opposed to simply requiring law enforcement officials to comply with the law or to insure protection of constitutional rights which are ancillary to the integrity of the fact-finding process or reliability of the verdict, then the decision will be given retroactive effect. In such cases, the other considerations enumerated above are given little weight.

The selective death penalty provision of the Federal Kidnaping Act did not merely result in denying an accused a fair trial, it denied him any trial at all. Furthermore, it forced him to forfeit his right to confront and cross-examine his accusers. The right to a trial and the right to confront and cross-examine accusers are so fundamental that this Court has, in the past, accorded cases involving these rights retroactive application. Therefore, the decision in *Jackson* should also be applied retroactively.

II.

The Test That Should Be Applied to Establish on a Collateral Attack That a Plea of Guilty Under the Federal Kidnaping Act, Made Prior to United States v. Jackson, Was Involuntary, Is Whether Fear of the Death Penalty Needlessly Encouraged the Plea.

Assuming that this Court does give *Jackson* retroactive application, the next step is to delineate a test to determine when guilty pleas prior to *Jackson* were involuntary because of the selective death penalty provision of the Federal Kidnaping Act. An obvious prerequisite would be that the death penalty must have been a possibility, which could be determined from the indictment itself. The indictment in the case involved would have to charge that the kidnap victim was "not liberated unharmed" in order to activate the death penalty provision.

Beyond the requirement that the death penalty be a possibility, the remainder of the litmus for involuntary guilty pleas is suggested in *Jackson* itself. The case indicates that a guilty plea under the Federal Kidnaping Act would have been involuntary if the selective death penalty provision "needlessly encouraged" the guilty plea.

The term "needlessly encouraged" suggests that the fear of the death penalty need not have been the only, or even the primary motivation for pleading guilty. If the evidence establishes that such fear was a definite factor in influencing a guilty plea, then it is clear that the defendant was faced with a choice which the Constitution forbade, and his guilty plea was involuntary.

III.

Petitioner's Plea of Guilty to a Charge Under the Federal Kidnaping Act Was Needlessly Encouraged by Fear of the Death Penalty, and, Under United States v. Jackson, That Plea Was Involuntary and Invalid.

In the instant case, the district court held that the Federal Kidnaping Act was constitutional in all respects and then went on to decide that the Petitioner pled guilty to the indictment for other reasons. Because of the incorrect conclusion of law on the constitutionality of the statute, the district court ignored the mass of evidence of the influence of the death penalty provision on Petitioner's guilty plea. Once the decision was made that the statute was constitutional, that evidence was not relevant or germane.

The United States Court of Appeals for the Tenth Circuit merely compounded the error of the district court. It refused to go back through the record to review the evidence on the influence of the death penalty provision on Petitioner, as it should have done, and held that the finding of the district court that Petitioner had pled guilty because of his co-defendant's confession was supported by substantial evidence. In effect, it adopted a rule that a plea of guilty to a charge under the Federal Kidnaping

Act prior to *Jackson* was not involuntary unless fear of the death penalty was the *only* reason for the plea.

However, if the test for determining whether Petitioner's guilty plea was voluntary is whether it was needlessly encouraged by the selective death penalty provision of the Federal Kidnaping Act, and if that test does not require that the fear be the only reason for pleading guilty, then the evidence in this record clearly establishes that Petitioner's guilty plea was involuntary under *Jackson*. The record is replete with evidence of the influence of the death penalty provision upon Petitioner. After his attorney investigated the case and after he had learned of his co-defendant's confession and desire to plead guilty, the chances of his being acquitted by a jury were apparently outweighed by the chances of his being convicted and receiving the death sentence. His mother, his attorney, the attorneys for his co-defendant, the newspapers and even the district judge emphasized the possibility of the Petitioner receiving the death penalty. His attorney felt that he would be convicted and would receive the death sentence "beyond a shadow of a doubt" and so advised the Petitioner. The attorney advised Petitioner to plead guilty "under all the circumstances" and "felt very gratified" when Petitioner had done so because he felt that he had "saved" Petitioner from a death sentence.

Based upon the uncontradicted evidence in the record from all witnesses, the fear of the death penalty was a factor, if not the primary factor, in influencing the Petitioner to plead guilty to the kidnaping charge against him, and, therefore, his guilty plea was involuntary and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States.

ARGUMENT

I.

United States v. Jackson Should Have Retroactive Application to Federal Kidnaping Act Guilty Pleas Entered Prior to the Date of That Decision.

Petitioner was indicted, as stated heretofore, on January 27, 1959, for a violation of 70 Stat. 1043, 18 U.S.C. 1201. The indictment charged that the kidnap victim was "not liberated unharmed" (A. 13). On April 30, 1959, Petitioner withdrew his plea of not guilty, and he entered a plea of guilty, which was accepted by the district court (A. 26-28). Thus, the Petitioner's plea of guilty was entered, accepted and a judgment entered thereon considerably prior to this Court's decision in *United States* v. *Jackson,* 390 U.S. 570 (1968). Question has been raised as to the retroactive application of *Jackson* to guilty pleas entered and finalized prior to the effective date of that decision. See, Memorandum of the United States on Motion for Leave to Proceed *in Forma Pauperis* and on Motion for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, pp. 6-7. There is also an apparent conflict in the lower federal courts on the question of the retroactive application of *Jackson.* In *Pindell* v. *United States,* 296 F.Supp. 751 (D. Conn. 1969), and in *United States ex rel. Buttcher* v. *Yeager,* 288 F.Supp. 906 (D. N.J. 1968), it was held that *Jackson* was not to be given retroactive application. Conversely, *Alford* v. *North Carolina,* 405 F.2d 340 (4 Cir. 1968); *Natale* v. *United States,* 287 F.Supp. 96 (D. Ariz. 1968); and *McFarland* v. *United States,* 284 F.Supp. 969 (D. Md. 1968), all held that *Jackson* was to be applied

retroactively. In the instant case, the United States Court of Appeals for the Tenth Circuit also apparently believed that *Jackson* was to be applied retroactively, citing with approval the decision in *McFarland*. In view of this conflict in decisions in the lower federal courts, and in view of the fact that the United States has raised this as an issue in the instant case, the point is briefed herein. It is respectfully submitted that *Jackson* should be given retroactive application for one or more of the following reasons:

(1) It is implicit from the language of *Jackson* that it should be retroactive; or,

(2) *Jackson* declared a federal criminal statute unconstitutional, and the doctrine of absolute retroactive invalidity is applicable and requires retroactive application; or,

(3) Based upon recent opinions of this Court involving the question of retroactivity of other decisions, the constitutional defect pruned out of the Federal Kidnaping Act in *Jackson* went to the very fairness and integrity of the fact-finding process, and, therefore, the decision must be applied retroactively.

The bases for the foregoing conclusions will be discussed in detail hereinafter.

A. It Is Implicit From the Language of *Jackson* That It Should Be Applied Retroactively.

The rationale of *Jackson* was that the inevitable effect of the selective death penalty provision of the Federal Kidnaping Act was "to discourage assertion of the Fifth

Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581. It was said that:

> "Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." (*Id.* at 583.)

The decision points out that the "evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers, but simply that it needlessly *encourages* them" (emphasis in original) (*Ibid.*), although it was recognized that not "every defendant who enters a guilty plea to the charge under the Act does so involuntarily." (*Ibid.*)

The basis of the *Jackson* decision is, therefore, that the selective death penalty provision of the Federal Kidnaping Act could result in involuntary guilty pleas by Defendants electing to avoid any possibility of receiving the death penalty. If it is acknowledged that some guilty pleas *in futuro* could be involuntary if the selective death penalty provision had remained in the Federal Kidnaping Act, then it necessarily follows that some guilty pleas entered prior to *Jackson* could have also been involuntary because of that provision. Logic and justice demand, then, that *Jackson* be given retroactive effect to correct any such defective guilty pleas.

Since the defect of the Federal Kidnaping Act, prior to *Jackson,* was the potentiality for inducing involuntary pleas of guilty, it should automatically follow that *Jackson* be applied retroactively, because this Court has always held that involuntary pleas of guilty are void and of no

effect, and may be attacked collaterally, even after final judgment has been entered. *Machibroda* v. *United States,* 68 U.S. 487 (1962); *Shelton* v. *United States,* 356 U.S. 26 (1958); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Waley* v. *Johnston,* 316 U.S. 101 (1942); *Walker* v. *Johnston,* 312 U.S. 275 (1941). Petitioner's motion pursuant to 63 Stat. 105, 28 U.S.C. 2255, constituted a collateral attack upon his guilty plea, and, in said motion, he alleged, *inter alia,* that the plea was involuntary because of the death penalty provision in the Federal Kidnaping Act (A. 5). That allegation was sufficient to open the guilty plea to collateral attack under *Jackson,* and the other decisions of this Court cited above.

B. *United States v. Jackson* Was a Declaration of the Unconstitutionality of a Federal Criminal Statute, and the Doctrine of Absolute Retroactive Invalidity Should Apply to Insure Protection of Individual Rights.

An alternative reason in support of retroactive application of *Jackson* is that such decision constituted a declaration of the unconstitutionality of a federal criminal statute which had been in effect for almost thirty-five years. The potential for impairment of constitutional rights during that period of time by an unconstitutional criminal statute is so great that justice requires that the invalidating decision be given retroactive effect. This Court has held in the past that "an unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it carries no office; it is in legal contemplation as inoperative as though it had never been passed." *Norton* v. *Shelby County,* 118 U.S. 425 (1886).

Since an unconstitutional statute is not a law, it is wholly void and ineffective for any purpose. Its unconstitutionality dates from the time of its enactment and not merely from the decisions so branding it. *Chicago, I. & L. R.R.* v. *Hackett,* 228 U.S. 559 (1913); *Litle Rock & Ft. S. R.R.* v. *Worthen,* 120 U.S. 97 (1887).

Norton, Hackett and *Worthen* were all cases involving civil statutes, but the rationale should be even more apropos to a declaration of the unconstitutionality of a criminal statute. Their relevance is underscored by this Court's enunciation of the doctrine that if a person is convicted under an unconstitutional statute, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. *Ex parte Royall,* 117 U.S. 241 (1886). An unconstitutional law is void, and is as no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. *Ex parte Siebold,* 110 U.S. 371, 376 (1879). If a statute prescribing an offense is void, the court is without jurisdiction, and a person convicted under it is entitled to be discharged. *Ex parte Yarbrough,* 110 U.S. 651, 654 (1884). The foundation for the theory of absolute retroactive invalidity of an unconstitutional statute is discussed in some detail by this Court in *Linkletter* v. *Walker,* 381 U.S. 618, 622-25 (1965).

An exception to the rule of absolute retroactive invalidity of an unconstitutional statute has been carved out in later decisions of this Court, but this exception has applied only to the declaration of the invalidity of a civil statute. *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940). There, the Court recognized that: "The actual existence of a statute, prior to such

determination, is an operative fact and may have consequences which cannot be justly ignored." (*Id.* at 374.) It was held, therefore, that when there has been past reliance upon the invalid statute, and property rights have vested under it, the doctrine of absolute retroactive invalidity cannot be justified, and the decision will be prospective only. (*Ibid.*) It is submitted, however, that when a civil statute is involved, and there has been reliance and vesting of property rights, prospective and not retroactive application of the invalidating decision may be justified. But there are fundamentally different considerations demanding retroactive application where a criminal statute is declared invalid (despite the language of this Court contained in *Linkletter* v. *Walker, supra,* 381 U.S. at 627).

Therefore, when a federal criminal statute is declared unconstitutional, the doctrine of absolute retroactive invalidity should be applicable. The justification for this conclusion can be found in the policy which underlies the exception to the rule of absolute retroactive invalidity found in *Chicot County Drainage Dist., supra.* The dominant theme or policy of that exception is the protection of the rights of the individual. If that is the *raison d'etre* for divergent rulings on the retroactive application of decisions invalidating statutes, then, in order to implement that policy when a criminal statute is involved, the Court must adhere to the doctrine of absolute retroactive invalidity. Otherwise, we could have the intolerable situation of individuals being convicted of acts which might not be crimes, being punished therefor, and being given no means of redress in the courts.

The fact that this Court, in *Jackson,* only declared a portion of the Federal Kidnaping Act to be unconstitu-

tional should not change the analysis in any material respect. That portion of the statute declared unconstitutional (i.e., the selective death penalty provision) was an integral part of the statute. It was the worm in the apple and it spoiled the fruit. It resulted in the possibility—indeed, probability—of tainted, involuntary pleas of guilty. Even though it was held by this Court to be severable, 390 U.S. at 586, that surgery only excised the malignancy in the statute. It did not cure the prior effect of that malignancy. That effect can only be dealt with through retroactive application of *Jackson.*

The issue posed here is not the guilt or innocence of any particular defendant who pled guilty to a charge under the Federal Kidnaping Act prior to *Jackson;* the issue is whether some defendants may have been faced with a choice which could not, under the Constitution, have been properly required of them, and, if so, whether that improper choice influenced their pleas. If such conditions did exist prior to *Jackson,* then it is clear that we have a situation in which there are individuals in our prisons who are being punished under illegal and invalid guilty pleas. And, to go back to the point made under the prior subsection, this Court has always held that involuntary guilty pleas can be collaterally attacked. *Machibroda* v. *United States,* 368 U.S. 487 (1962). Therefore, because only a part of a statute, rather than an entire statute, was declared unconstitutional, does not prevent application of the doctrine of absolute retroactive invalidity, which, in turn, requires that the *Jackson* decision be applied retroactively.

In passing, it might be noted that there are a number of recent opinions of this Court involving the issue of retroactive application of other decisions. See, e.g., *Link-*

letter v. *Walker,* 381 U.S. 618 (1965), in which it was held that the decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), would be prospective only. These recent decisions will be discussed in detail in the immediately succeeding section of this brief, but, at this point, it should be noted that they are not germane to the foregoing analysis because all of them involve questions of criminal law enforcement procedures, not the declaration of the unconstitutionality of federal criminal statutes. In each of these cases, this Court, in effect, determined that an existing criminal law enforcement procedure was not to be utilized further, and, in some of them, the Court even outlined new procedures to be followed. See, e.g., *Miranda* v. *Arizona,* 381 U.S. 436 (1966). There is a fundamental distinction between holding a statute unconstitutional and holding that a criminal law enforcement procedure utilized in the past can no longer be followed. When a criminal statute is declared unconstitutional, it is void, *ab initio.* Each person convicted under it prior to such declaration was deprived of his constitutional rights. Each person convicted under it prior to such declaration was not guilty because he did not commit any crime. On the other hand, a criminal law enforcement procedure, even though invalid, is not a law. Its effect is really ancillary to the question of the guilt or innocence of the accused. It normally does not go to the question of the fairness of the trial itself or to the reliability of the verdict. Therefore, there is justification for treating a decision on the unconstitutionality of a criminal statute differently from a decision on the illegality of a criminal law enforcement procedure, when faced with the question of whether the decision should be retroactive or prospective only.

In summary, it is respectfully submitted that, under the doctrine of absolute retroactive invalidity, followed previously by this Court in cases involving criminal statutes, *Jackson* should be given retroactive application.

C. Even if the Recent Decisions of This Court on Criminal Law Enforcement Procedures Were Applicable on the Retroactivity of *United States* v. *Jackson*, Under Those Decisions *Jackson* Should Be Applied Retroactively.

As stated heretofore, there are a number of relatively recent opinions of this Court which have considered the question of retroactive application of other decisions affecting criminal law enforcement procedures. It is respectfully submitted that even if these decisions are authority on the question of the retroactive application of *Jackson*, they justify a conclusion that *Jackson* should be given retroactive application. The decisions referred to indicate that, where the purpose of a decision of this Court is to require law enforcement officials to comply with the provisions of the Constitution, or a federal law, the effect of such a decision will be prospective only, for any violation of constitutional rights by procedures previously followed by law enforcement officials seldom raises a serious question as to the validity of the decision of the jury on guilt or innocence, or deprives the accused of a fair trial. Where, however, the effect of the unconstitutional criminal law enforcement procedure casts substantial doubt on the correctness of the determination of the accused's guilt or innocence, or has effectively denied the accused a fair trial, the decision invalidating the procedure has been held to have retroactive application. The requirements of a fair

trial and a reliable verdict, then, have been held to transcend all other relevant considerations.

Thus, in a number of cases, this Court has held that decisions involving the actions of law enforcement officials would be prospective in application. The case of *Mapp* v. *Ohio,* 367 U.S. 643 (1961), held inadmissible at a trial of the accused any evidence obtained against him by an unreasonable search and seizure. In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Court refused to apply *Mapp* retroactively, stating that the purpose of *Mapp* was as a deterrent to lawless police action. 381 U.S. at 636. It could not be said that this purpose would be advanced by making the rule retroactive. Misconduct of the police prior to *Mapp* had already occurred and would not be corrected by releasing the prisoners involved. It was noted that the decision only created a "procedural weapon that had no bearing on guilt. . . ." (*Id.* at 637). The aim and intention of *Mapp,* then, was to force law enforcement officials to respect an accused's right to be free from unreasonable searches and seizures by assuring that, in the future, no profit would be gained by violation of such right. Likewise, in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), the Court refused to apply retroactively the rule of *Lee* v. *Florida,* 392 U.S. 378 (1968), which is that evidence obtained in violation of Section 605 of the Federal Communications Act, 48 Stat. 1964, 1103, 47 U.S.C. 605, is not admissible at trial. And, in *Desist* v. *United States,* 394 U.S. 244 (1969), the exclusionary rule of *Katz* v. *United States,* 389 U.S. 347 (1967), precluding from evidence the fruits of electronic eavesdropping without a search warrant, was held to be prospective only. The decisions in *Lee* and *Katz* were, as in *Mapp,* primarily intended to compel law enforcement officials to comply with the law.

Several other recent decisions have had the purpose of insuring protection of constitutional rights which are actually ancillary to the integrity of the fact-finding process or the reliability of the verdict, and these decisions have also been limited to prospective application. In *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), it was held that *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), would not be applied retroactively. The primary purpose of *Miranda* and *Escobedo* was to guaranty full effectuation of the privilege against self-incrimination. *Johnson* followed the rationale of *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406 (1966), which had previously held that the rule of *Griffin* v. *California,* 380 U.S. 609 (1964), relating to the unconstitutionality of the prosecution commenting on the defendant's failure to testify at his trial, was to be prospective only. *Tehan* also dealt with the effectuation of the privilege against self-incrimination. The Court said that "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulders the entire load.' " 382 U.S. at 415. As in *Mapp,* the doctrine dealt with rested on different considerations than constitutional decisions that had been applied retroactively. The Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth at the trial, and, therefore, retroactive application was not required. (*Id.* at 416.)

Similarly in *Stovall* v. *Denno,* 388 U.S. 293 (1967), it was held that the decisions in *United States* v. *Wade,* 388 U.S.

218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), requiring counsel for the accused to be present during pre-trial confrontation of witnesses for identification purposes, were not to be retroactive. The reasoning in *Stovall* was that when the probabilities of the condemned practice affecting the integrity of the truth-determining process were weighed against prior reliance on the practice and the impact of retroactivity on the administration of justice, the "unusual force of the countervailing considerations" dictated a conclusion in favor of prospective application only. 388 U.S. at 298-99.

On the other hand, this Court has held, even in cases where the ultimate decision was for prospective application only, that where the principle involved "went to the fairness of the trial—to the very integrity of the fact-finding process", *Linkletter* v. *Walker*, *supra*, 381 U.S. at 639, then it would require retroactive application. "The basic purpose of the trial is the determination of truth", and the decision will be retroactive when the effect of a law enforcement procedure is to "impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." *Tehan* v. *United States ex rel. Shott*, *supra*, 382 U.S. at 416. There must be such unfairness in the reliability of the fact-finding process as to deny the accused due process of law. *Stovall* v. *Denno*, *supra*, 388 U.S. at 299.

Thus, in a number of other cases wherein the procedure invalidated did affect the reliability and integrity of the fact-finding process, this Court has made its decisions retroactive. For example, *Jackson* v. *Denno*, 378 U.S. 368 (1964), which involved the right of an accused to effective exclusion of an involuntary confession at his trial, was

itself a collateral attack, and retroactivity was automatic. In *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), the right of an accused to counsel at his trial was held to be retroactive. Other rights which have been made retroactive include the right of an indigent defendant to have a transcript furnished by the state for his appeal; the right of confrontation and cross-examination of witnesses, as outlined in *Pointer* v. *Texas,* 380 U.S. 400 (1965), and *Barber* v. *Page,* 390 U.S. 719 (1968); the right to counsel on appeal; the right to counsel on a plea of guilty; the right to counsel at a hearing concerning revocation of probation and imposition of a deferred sentence; the right to have a co-defendant's inculpatory statements excluded from evidence; and, the right of a person accused of a capital crime not to have excluded from the jury all persons having conscientious qualms against the death penalty. See, *Burgett* v. *Texas,* 389 U.S. 109 (1967), and *Doughty* v. *Maxwell,* 376 U.S. 202 (1964) (right of counsel at trial); *Eskridge* v. *Washington Prison Board,* 357 U.S. 214 (1958), and *Brookhart* v. *Janis,* 384 U.S. 1 (1966) (confrontation and cross-examination of witnesses per *Pointer* v. *Texas, supra); Berger* v. *California,* 393 U.S. 314 (1969) (Confrontation and cross-examination per *Barber* v. *Page, supra); Smith* v. *Arizona,* 389 U.S. 10 (1967), and *Anders* v. *California,* 386 U.S. 738 (1967) (right to counsel on appeal); *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) (right to counsel when guilty plea tendered); *McConnell* v. *Rhay,* 393 U.S. 2 (1968) (right to counsel at revocation of probation hearing); *Roberts* v. *Russell,* 392 U.S. 293 (1968) (exclusion of co-defendant's inculpatory statements); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) (non-exclusion of jurors with qualms against capital punishment).

The factors to be given consideration in determining whether a decision on a question of criminal procedure is to be given retroactive effect were first enunciated in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and are summarized as follows:

(a) The purpose to be served by the new standards;

(b) The extent of the reliance by law enforcement authorities on the old standards; and,

(c) The effect on the administration of justice of a retroactive application of the new standards. See also, *Stovall* v. *Denno, supra,* 388 U.S. at 297. The most important of these considerations is "the purpose to be served by the new constitutional rule." *Desist* v. *United States, supra,* 394 U.S. at 249. And, from the foregoing-cited cases, where the purpose to be served by the new constitutional rule is to insure a fair trial and a reliable verdict, then considerations of reliance on prior rules by law enforcement authorities and the effect of retroactivity on the administration of justice are given little weight.

In regard to the instant case, it is submitted that the cited decisions require that *Jackson* be applied retroactively. The effect of encouraging an accused person to plead guilty to avoid a possibility of the death penalty does not merely result in denying him a *fair trial,* but denies him *any trial* at all. Therefore, it is clear that the purpose underlying *Jackson* was to insure persons accused of crimes under the Federal Kidnaping Act a fair trial and a reliable verdict. The selective death penalty provision stricken from the Act by *Jackson* subverted that purpose, affected the fairness of the trial process in such

cases, and "infected" proceedings under the Act with a "clear danger of convicting the innocent." Since the purpose of *Jackson* was so obviously to fulfill the principles outlined in *Linkletter, Tehan* and *Stovall,* any claims of reliance upon the old standards by law enforcement authorities or an adverse effect upon the administration of justice by a retroactive application of *Jackson,* would deserve little weight, as this Court held in *Desist.* Morever, by yielding to the temptation of avoiding the death penalty by pleading guilty, the accused is forced to forfeit his right to confront and cross-examine his accusers, another right considered to be so fundamental that it has been given retroactive effect. *Brookhart* v. *Janis,* 384 U.S. 1 (1966); *Berger* v. *California,* 393 U.S. 314 (1969).

II.

The Test That Should Be Applied to Establish on a Collateral Attack That a Plea of Guilty Under the Federal Kidnaping Act, Made Prior to United States v. Jackson, Was Involuntary, Is Whether Fear of the Death Penalty Needlessly Encouraged the Plea.

Assuming that *Jackson* is to be given retroactive effect by this Court, the threshold question is what test will be applied on a collateral attack, to determine when a plea of guilty, made prior to *Jackson,* to a charge under the Federal Kidnaping Act, was involuntary, and, therefore, invalid. An obvious prerequisite would, of course, be that the death penalty was a possibility in the particular case being considered. The indictment in such a case would, then, have to charge, in the language of the statute, that the kidnap victim was "not liberated unharmed." Some

might suggest that a more stringent prerequisite, such as a requirement that the death penalty in the particular case under review be a "reasonable probability", but such a requisite would be unreasonable and unfair because it would require the court to indulge in speculation as to what a jury would have done had the accused pled not guilty in a particular case. It should suffice that the indictment charged the language necessary to invoke the death penalty because it can, and should, be presumed that, had the United States Attorney not had evidence to justify a request for the death penalty, then the indictment would not have contained the operative language.

Once the prerequisite that the death penalty have been a possibility is satisfied, what other evidence will suffice to demonstrate that a guilty plea to a charge of kidnaping was unconstitutionally influenced by the selective death penalty provision of the Act? It is submitted that the answer to that query and the test to be utilized is suggested in *Jackson* itself. In *Jackson* it was stated that:

> "... the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers, but simply that it needlessly *encourages* them." 390 U.S. at 583. (Emphasis in original.)

The operative words are "needlessly *encourages*". If fear of the death penalty provision in the Federal Kidnaping Act needlessly encouraged any defendant to plead guilty to a charge of kidnaping, then it follows that his plea was involuntary and invalid. *Webster* defines the word "encourage" as follows:

> "(1) to give courage to; to give confidence to; to inspire with courage, spirit or strength of mind; to em-

bolden; to animate; to incite; to inspirit; (2) to help; to give support to; to be favorable to; to foster."

Webster's New Twentieth Century Unabridged Dictionary, p. 598 (2 Ed. 1966). Synonymous are the words "inspire, urge, impel, stimulate, instigate, incite, promote, advance, forward." "Encourage" connotes an intention that fear of the death penalty simply be a factor or circumstance in influencing a plea of guilty. The word is certainly not as strong as "coerced", "caused", "compelled" or "motivated", which would connote an intention that fear of the death penalty be the only factor, or the primary factor, in influencing a plea of guilty.

As a consequence of the choice of language utilized in *Jackson,* it is submitted that if it can be said, based upon the evidence in the record, that the invocation of the death penalty was a possibility, based upon the charge in the indictment, and that the fear of the death penalty was *a definite factor* in the decision of an accused to plead guilty to a charge under the Federal Kidnaping Act, then such fear "needlessly encouraged" the guilty plea, and the plea was involuntary. Under this theory, the fear of the death penalty would not have to be the only factor, or even the primary factor, in the decision to plead guilty, so long as it was one of the factors which led to the decision.

Of those lower court cases which have previously held that *Jackson* is to be applied retroactively, two of them, *Alford* v. *North Carolina,* 405 F.2d 340 (4th Cir. 1968), and *McFarland* v. *United States,* 284 F.Supp. 969 (D. Md. 1968), have dealt with the question of the test to be applied in determining if a prior guilty plea was involuntary. In *McFarland,* the Court did not delineate a test, *per se,* but simply stated, at page 977 of the opinion:

"... the Jackson case should not be applied indiscriminately to strike out every judgment heretofore entered in a case where a defendant has entered a guilty plea; totality of the circumstances in each case should be considered to determine whether there was any denial of due process in the light of the development of the law. When the totality of the circumstances in the instant case is considered, the Court finds that the pleas which were entered by McFarland in the Maryland National Bank case were entered for several reasons. *The hope of minimizing the chances of a death sentence in the federal case was not the only reason for entering the pleas. Of at least equal importance was the belief of McFarland and his attorney Levin that if a life sentence could be obtained in the federal case, the prosecution and trial of the murder case in the criminal court of Baltimore, with a possible death sentence resulting therefrom, could probably be avoided.*" (Emphasis added.)

The language in *McFarland* indicates that the district court felt that the fear of the death penalty had to be the *only* reason for a plea of guilty in order to make a plea of guilty to a kidnaping charge involuntary under *Jackson*. *McFarland* is much too restrictive, however, and it ignores the plain and obvious meaning of *Jackson*. The district court there recognized that the plea of guilty was made with the hope of avoiding the death penalty. Therefore, the accused in that case was faced, by virtue of the rationale of *Jackson*, with a decision that "needlessly chilled the exercise of basic constitutional rights." 390 U.S. at 582. That "chilling" effect was unnecessary, and, therefore, excessive. It "needlessly encouraged" the guilty plea. The

fact that the accused may also have been influenced by the hope of avoiding a prosecution on another charge was immaterial and not a proper reason for refusal to vacate the guilty plea in *McFarland.*

The *Alford* decision is not as restrictive as *McFarland.* In that case, the United States Court of Appeals for the Fourth Circuit stated, at page 347 of the opinion:

> "Jackson, by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, *that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty.*" (Emphasis added.)

Thus, in *Alford,* the test enunciated was that the "principal motivation" (which would not necessarily be the only motivation) in pleading guilty to a charge under a provision comparable to the death penalty provision in the Federal Kidnaping Act, be the fear of the death penalty. It is respectfully submitted that the *Alford* decision, while it is more in keeping than *McFarland* with the language of this Court in *Jackson,* nevertheless still goes beyond the plain requirements of that language and establishes a more stringent test than was indicated in *Jackson,* as well as in analogous decisions of other federal courts.

Perhaps the situation that is most closely analogous to the question posed here is that situation in which a confession is illegally and unconstitutionally coerced from an accused, and he thereafter pleads guilty to the charge to

which he has confessed. That fact situation has arisen on numerous occasions in the past, and the decisions thereon can give some guide as to the tests to be applied to the instant situation. In the circumstance of the coerced confession followed by a guilty plea, although the language of the courts is not consistent, it is submitted that no court has required that the coerced confession be the only factor in the plea of guilty before the plea will be held involuntary.

It has always been held that, if an accused has pled guilty to a charge after a confession has been illegally extracted from him, then the guilty plea may be collaterally attacked. *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956). With a case in that posture, the court hearing the evidence is in exactly the same position as a court hearing evidence on a plea of guilty under the Federal Kidnaping Act; i.e., it must determine whether the relationship between the coerced confession and the plea of guilty was such as to make the plea involuntary.

In *Knowles* v. *Gladden,* 378 F.2d 761, 766 (9th Cir. 1967), a case involving that issue, the court held that:

> "If the plea [of guilty] was induced by incriminating statements made involuntarily, the conviction cannot stand."

See also, *Wright* v. *Dickson,* 336 F.2d 878, 882 (9th Cir. 1964). In *Bell* v. *Alabama,* 267 F.2d 243, 246 (5th Cir. 1966), the court, in the same context, stated:

> "We turn first to the voluntariness of appellant's confession. . . . [T]he voluntariness of the confession is the critical issue, for the averments of the petition clearly indicate a causal relationship between the al-

legedly coerced confession and the subsequent plea of guilty. Of such cases, the Supreme Court has said, 'Our prior decisions have established that: (1) a conviction following trial or on a plea of guilty, based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause. . . .'"

In *Gladden* v. *Holland,* 366 F.2d 580, 583 (9th Cir. 1966), it was said that: "A conviction on a plea of guilty based on a confession extorted by mental coercion is invalid under the Due Process Clause of the Fourteenth Amendment. . . . The confession given by Holland having been determined to be of this nature, the problem is to determine whether the guilty plea was based thereon." In *Holland* the court went on to say, from the totality of the circumstances, it was apparent that the conditions which rendered the confession involuntary had not been substantially removed at the time he entered his plea of guilty.

And, another example is *Zachery* v. *Hale,* 286 F.Supp. 237 (M.D. Ala. 1968). In that case, the accused claimed that his plea of guilty was based, in part, upon the trial court's violation of due process in refusing to give him a hearing on his sanity, and, in part, upon an illegal confession that had been extracted from him. The court indicated that the accused was entitled to have his plea vacated on either of these grounds. On the question of the extracted confession, it stated, at page 240 of the opinion:

"The involuntariness of the confession is significant, even though Zachery upon the advice of his counsel withdrew his pleas of not guilty and not guilty by reason of insanity, and on May 29, 1961, entered a plea of guilty, since one of Zachery's court-appointed coun-

> sel, . . . testified before this court that the obtaining of the confession from Zachery was a factor that entered into his recommending to Zachery that he plead guilty. Therefore, we have one of Zachery's court-appointed counsel, as he was forced to do under the circumstances, give some consideration and weight to an illegal confession in recommending to Zachery that he enter a plea of guilty to the first degree murder charge. Thus, it is readily apparent that the plea of guilty that Zachery entered in the Circuit Court of Lee County, Alabama, on May 29, 1961, was not voluntary; to the contrary, it was in part forced by reason of the illegal confession that had been extracted from him by the authorities on May 19, 1961."

It is submitted that based upon the cited authorities, in the analogous situation of a plea of guilty following a coerced confession, the accused is not required to show that the only motivation, or even the primary motivation, for his plea of guilty was the unconstitutionally obtained confession. If he can show that the coerced confession "induced" the plea; or that the plea was "based" upon the confession, even if only in part; or, that there is a causal connection between the plea and the confession, then the plea will be held to be involuntary. But, see *Briley, Jr.* v. *Wilson,* 376 F.2d 802 (9th Cir. 1967) (where the court indicated that the guilty plea must be primarily motivated by a deprivation of a fundamental constitutional right before it will be involuntary). And, as is strongly suggested in *Zachery, supra,* the coerced confession need not necessarily be the only factor in influencing the decision.

Based upon the foregoing, then, the test for determining whether a guilty plea under the Federal Kidnaping Act

was involuntary, should be whether that plea was needlessly encouraged by the fear of the death penalty. "Needless encouragement" should be something less than "primary" or "sole" motivation, and the mere fact that other factors may have influenced a decision to plead guilty should not bar relief. A man's mind is not so compartmentalized that a decision can be based upon one factor only. Generally, it is in the nature of things that any decision made by a human being is influenced by numerous factors. In the instant case, the Petitioner admitted that the fear of the death penalty was not the only reason for his plea of guilty (A. 45), but it was one of his reasons, and, therefore, that was sufficient to constitute the "needless encouragement" necessary to make his plea involuntary.

III.

Petitioner's Plea of Guilty to a Charge Under the Federal Kidnaping Act Was Needlessly Encouraged by Fear of the Death Penalty, and, Under United States v. Jackson, That Plea Was Involuntary and Invalid.

Petitioner's plea of guilty was entered and accepted by the United States District Court for the District of New Mexico on April 30, 1959 (A. 26-28). His motion to vacate sentence was heard on March 20, 1968, and an order was entered denying the motion on March 27, 1968 (A. 36, 93). The district court found that the Federal Kidnaping Act was constitutional in all respects, and it therefore rejected all of the Petitioner's evidence on the influence of the death penalty provision on his plea of guilty. It is submitted that this evidence, in light of *Jackson,* was relevant and material; that it should have been considered by the district court; and, that it established that Petitioner's guilty

plea was needlessly encouraged by fear of the death penalty, and was, therefore, involuntary.

After hearing all of the evidence in the case, the district court found:

> "It does not appear to me that the statute is unconstitutional, and I so hold. It has been before the courts on many occasions, although the precise point raised here has probably not been raised except in the Timbers case. However, this Court respectfully differs with Judge Timbers about this matter.
>
> "The question has been raised that the petitioner was coerced into pleading guilty because he was afraid to ask for a jury trial and take the chances on getting a death sentence. Some question has been raised about the acts of Judge Hatch in this regard. After hearing the evidence, the Court was of the opinion, and now finds, that the petitioner decided to plead guilty when he learned that his co-defendant was going to plead guilty, and that his determination had nothing to do whatsoever with anything that Judge Hatch said, or with what his attorneys might have said. The Court finds that the petitioner knew all about the confession given by his co-defendant. . . . The Court further finds that the plea of guilty was made by the petitioner by reason of other matters, and not by reason of the statute, nor by reason of any acts or (sic) conduct of Judge Hatch. It is the conclusion of the Court that the statute is constitutional and that the proceedings before Judge Hatch are constitutional" (A. 90).

In concluding, the district court stated:

"The Court concludes that the statute in question is constitutional and that the plea was voluntarily and knowingly made" (A. 92).

It is obvious that the conclusion of the district court that the statute did not improperly influence Petitioner's plea had to be based upon the decision that the Federal Kidnaping Act was constitutional. Having reached the decision that the statute was constitutional in all respects, the determination that it did not improperly influence the guilty plea logically followed. With the issue of the effect of the statute thus disposed of, the district court then rejected Petitioner's other contentions and concluded that Petitioner's plea of guilty was influenced by his co-defendant's confession (A. 90). It may be, indeed, that the plea of guilty was influenced to some extent by what Petitioner's co-defendant did, but the incorrect decision of the district court on the constitutionality of the statute had the effect of ignoring the mass of evidence in the record from all of the witnesses, the Petitioner himself, his co-defendant, his mother, and the attorneys involved, that fear of the death penalty was a significant and definite factor in causing him to plead guilty.

The Court of Appeals for the Tenth Circuit, on appeal, also ignored the mass of evidence on the influence of the death penalty provision, and simply held that the district court's finding that Petitioner's guilty plea was influenced by the co-defendant's confession was supported by substantial evidence in the record. It did not attempt to go back through the record, as it should have done, and review the evidence again, in the light of *Jackson,* to consider the testimony relating to the effect of the death

penalty provision on Petitioner's guilty plea. Because of this failure, the Court of Appeals merely compounded the error of law of the district court.

However, if *Jackson* is to be applied retroactively, and if the test to be utilized to determine voluntariness of a prior plea of guilty under the Federal Kidnaping Act is whether the fear of the death penalty was a factor needlessly encouraging the guilty plea, as argued hereinbefore, then the Petitioner is entitled to a full and fair consideration of the evidence in the record on the influence of the death penalty provision, free from the debilitating effect of the district court's incorrect conclusion of law.

It is respectfully submitted that there is substantial evidence in the record, not only from the Petitioner himself, but from all of the other witnesses who testified, that fear of the death penalty not only needlessly encouraged his guilty plea, but such fear was, in fact, a definite, substantial and even significant factor in motivating him to so plead.

The evidence in the record clearly demonstrates that, from January to April, 1959, a number of events culminated in inducing Petitioner, against his desire and belief in his innocence, to withdraw his not guilty plea and enter a plea of guilty to the kidnaping indictment. These events bore on the influence of a possible death sentence. First, Petitioner was immediately made aware that he was facing a possible death sentence when he went before the district court for arraignment on January 28, 1959. At that time, the trial court stated:

> "The offense charged in this indictment is that of kidnaping and also provides that the person alleged to

have been kidnaped was not returned unharmed, which would make it possible, under the provisions of the law, *if the jury so determined and you were found guilty, that the death sentence could be imposed.*" (Emphasis added.) (A. 23).

While he was incarcerated between that time and the date of his change of plea, it was written up in the local newspapers that if he was tried by a jury, the maximum possible sentence that the Petitioner could receive was the death penalty (A. 48-49). However, at least up until the time that he learned that his co-defendant, Tafoya, had confessed, he resolved to persist in his plea of not guilty and to have his case tried to a jury (A. 40-42). Up until that time he felt that he would be found innocent by a jury (A. 49). He learned of his co-defendant's plea when his mother went down to the Albuquerque City Jail to see him (A. 47-48). She was not permitted to visit him at the time, because it was not during visiting hours (A. 38). She went around to the back of the jail and testified:

"... Then there was somebody, some fellow up there that yelled, 'Is there a Brady here?' So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, 'Mom, what are you doing? You are going to get yourself in trouble,' and I just said, 'For God's sake, plead guilty. They are going to give you the death sentence' " (A. 38).

Certainly, up until the time that he learned of his co-defendant's confession, Petitioner had to have weighed the chances of acquittal against the possible imposition of the death penalty because he was definitely made aware of that

possibility. The confession of his co-defendant apparently, however, changed his thinking on the chances of his being acquitted if he went before a jury. He did not actually see the confession until he met with his co-defendant and the three attorneys, Messrs. LaFollette, Espinosa and Chavez, some time in April (A. 43). Mr. Espinosa testified that the purpose of that meeting was to discuss the Petitioner's plea. He stated:

> "Q. What the nature of that conversation?
>
> "A. Most of the conversation was had between Mr. LaFollette and Brady. At that time, as I understood, Tafoya had informed Chavez that he was ready to change his plea; that he was going to enter a plea of guilty. The conversation that was had with Brady and Tafoya when I and LaFollette were present at the Federal Building was concerning the plea that Brady would enter. Tafoya had agreed to—or I won't say agreed. He had made up his mind and informed us that he was ready to plead guilty" (A. 57).

Petitioner testified that he thought that the meeting was for the purpose of discussing the manner of presentation of his defense (A. 43). However, he was shown a copy of Tafoya's confession and "from this moment on, every effort was made to induce . . . [him] to plead guilty." (*Ibid.*) His version of the conversation was as follows:

> "Q. Did your—did any of the attorneys present at that meeting indicate that you should change your plea prior to the time they handed you the statement?
>
> "A. No. No one did.
>
> "Q. Nothing then was said to discourage your plea?
>
> "A. Not until after the statement was handed to me.

"Q. All right. Who handed you the statement?

"A. I would think that Mr. Espinosa handed me the statement. I believe, to the best of my ability, Mr. Espinosa.

"Q. When he handed you the statement, did he say anything to you?

"A. Yes, he did. He said, 'How do you expect to fight this case with this statement that is going to be used against you?'

"Q. Are those his exact words to the best of your recollection?

"A. To the best of my recollection.

"Q. What did you do then?

"A. I read the statement and I felt pretty bad about it.

"Q. What do you mean you felt bad about it?

"A. Well, I felt bad about what was said in the statement because the statement was not accurate. The statement was a lie.

"Q. Did the statement tend to incriminate you?

"A. Definitely.

"Q. Did you have at that time any feeling with regard to the plea that you would enter after you had read the statement?

"A. Well, after I was spoken to, yes. After I was told that there was no defense, that all I could do was plead guilty, then I had no choice but to plead guilty" (A. 43-44).

Petitioner further testified that his own attorney, Mr. LaFollette, told him at that time that if he went to trial before a jury, "there was a great possibility . . . that . . .

[he] would be given the death sentence" (A. 44). He said that that influenced his decision as follows:

> " . . . Well, up to this period of time, I thought that Alfonso Tafoya and I were both pleading not guilty. At this time, I thought, well, if Alfonso Tafoya and I both pled not guilty and he testified on this, I thought I had a chance, but due to the fact when I seen he was going to plead guilty—at this time, also, Alfonso stated to me that he would testify for me. But, it just seemed very difficult for me to believe that any jury would believe Alfonso Tafoya testifying to me that I was not guilty when he in fact had pled guilty to this crime. So, I just couldn't grasp the situation quite right, you know" (A. 45).

Petitioner's co-defendant confirmed that the death penalty was discussed and emphasized by the attorneys at this meeting which was held to discuss Petitioner's plea (A. 54, 55-56).

The role played by the attorneys in this drama cannot be given enough emphasis. They advised Petitioner that he faced a death penalty and that, based upon the evidence they believed the Government would present at a trial, there was a definite probability that the Petitioner would be found guilty and the death penalty imposed. Mr. LaFollette testified at Petitioner's hearing on the motion to vacate sentence as Petitioner's attorney in 1959 (A. 63). His testimony conflicted in certain respects with the testimony of the Petitioner, but it did not conflict in the emphasis that was placed by everyone involved on the possibility of Petitioner being given the death penalty (A. 65-66, 70-71, 74-75). The transcript of his testimony is replete

with references evidencing his concern with the death penalty in 1959. His testimony was as follows:

> "Q. Did you ever discuss with Mr. Brady what his sentence might be?
>
> "A. What his sentence might be?
>
> "Q. If he would plead guilty?
>
> "A. Yes. We told him that under the statute, where they had any way injured the party allegedly kidnaped, that they would be subject to the death penalty, and I really didn't have to tell him that because Judge Hatch reminded us of it on at least three occasions, and it was written in the press where the death penalty was discussed, and the death penalty would apply in any case where there was injury to the person. Of course, with an allied charge of rape, that is certainly the most serious injury that I can think of" (A. 65-66).

At another place, he further testified:

> "Q. What did you tell Mr. Brady the maximum sentence was?
>
> "A. Well, I believe it was fifty years. That's my best recollection. If he didn't, if he pled guilty, because I didn't take any part in the Tafoya operation by which he changed his plea. I only learned that from Mr. Espinosa verbally and through a letter from Judge Chavez, and I naturally had told him he could get the death penalty, and so I felt very gratified when he decided to change his plea in that we saved him from a death penalty in my opinion" (A. 66).

And, at another point in the direct examination, he testified:

"Q. (Mr. McCarty continuing) You did after conducting your investigation and making yourself aware of the facts of the case to the extent you could, and after discussing the matter with your client, you were satisfied personally that it was a proper plea at that time?

"A. I don't believe I ever had a case where I had to do it. There would have been no chance before a jury and I can give some of the facts if the Court would like to know how impossible it was to take him before a jury with this case" (A. 68).

On cross-examination, also in the context of his recommending that Petitioner plead guilty, Mr. LaFollette testified:

"Q. Had you made up your mind at that time that he was guilty?

"A. Well, a lawyer doesn't necessarily make up his mind at any time. We never know for sure even after it is all over, but I had very good evidence against him in the file that had been furnished for my investigation that made it look very difficult for him before a jury.

"I certainly had a feeling that he would be convicted beyond a shadow of a doubt" (A. 70).

Mr. LaFollette repeated to Petitioner "several times" that he thought he "would be convicted beyond a shadow of a doubt" (A. 70).

One of the other attorneys involved, Mr. Gilberto Espinosa, testified and confirmed that the death penalty was discussed with Petitioner and that such penalty was a possibility if he persisted in his plea of not guilty (A. 61).

It is submitted that another significant factor that is apparent from the testimony is the role played by the district court in emphasizing the death penalty. Even after arraignment, Judge Hatch made, according to the attorneys, comments about the death penalty on several occasions. Mr. LaFollette testified:

"Q. Did you tell him that if he went before a jury, he would certainly get the death penalty?

"A. No. I told him though, that we were afraid he would and therefore Judge Hatch had expressed in open court that he thought he might get the death penalty, and I think that is enough to put a lawyer on notice.

"Q. Did Judge Chavez (sic) say this either before or at the time of or after he pled guilty?

"A. Oh, any conversation about the death penalty was prior to the sentencing, because that was deleted out before we pled guilty to it.

"Q. When did this conversation take place with Judge Hatch?

"A. Which one, now?

"Q. The one when Judge Hatch said there was a possibility of the death penalty?

"A. Well, he said that at the time of arraignment. If I am not mistaken, he said that—if I am not mistaken—he also admitted that at the time that we went to him and told him that we had decided to change our plea, and he said, 'Well, I think you are wise because there is—I would certainly recommend, submit the question of the death penalty to a jury.'

"Q. Then, as I understand it, you actually had a meeting in chambers with Judge Hatch?

"A. And the U. S. Attorney.

"Q. Before thy (sic) plea was ever changed?

"A. Yes.

"Q. What else took place at this meeting?

"A. Well, I believe it was for the purpose of changing the plea.

"Q. Who else was present besides yourself and Judge Hatch?

"A. Mr. Espinosa and I and Judge Hatch and the young U. S. Attorney, if I am not mistaken.

"Q. Was Judge Chavez there by any chance?

"A. No, I don't believe he was. He might have been. Now, we had several conferences with the court.

"Q. And then after this meeting, did you go back and tell Robert Brady that Judge Hatch thought if he went before a jury, he would get a death penalty?

"A. No, but I told him, thought, I thought he had a good chance of getting it and I still think that that was good advice.

"Q. You never mentioned that conversation with Judge Hatch?

"A. Never mentioned to him what Judge Hatch had said?

"Q. Yes.

"A. It was in the paper, and he was present in the hearings when he mentioned it.

"Q. Well, maybe I misunderstood, but I thought you had gone into Judge Hatch's chambers and that Judge Hatch had told you that he thought Mr. Brady would get the death penalty?

"A. He told counsel. I guess Brady wasn't present. When we went in and told him that we thought we

would change the plea, he said, 'Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury', and he had told us that previously, too.

"Q. And didn't you also indicate to me a little bit earlier that Judge Hatch said he thought the jury would recommend a death penalty?

"A. No. He said, 'It is very likely that they will get the death penalty.'

"Q. Now, did you report this conversation to Robert Brady?

"A. Well, I certainly did" (A. 70-72).

Later on, in open court, prior to accepting a guilty plea from Petitioner, Judge Hatch made the following statements:

"The Court: Before I enter the formal plea of guilty for these defendants, I want to make them a certain explanation which I am sure your attorneys have fully advised you of, but which I want to be certain each defendant understands. In a case of this kind, the indictment charges what could be a capital offense—that is, that the death sentence could be imposed. That sentence can only be imposed, however, where a jury recommends the imposition of the death penalty. On a plea of guilty, such as your attorneys announce you desire to enter, the Court alone cannot impose the death penalty. I could impose sentence anywhere up to life imprisonment. Do you understand that?

"Defendant Brady: Yes, sir.

"Defendant Tafoya: Yes, sir.

• • • • •

"The Court: There is some authority, respectable authority, to the effect that on a plea of this kind, the Court might possibly empanel a jury and submit the question of whether the death penalty should be imposed. That is hardly a practical matter, as I view it now for this reason: In order for a jury to pass intelligently, if such power exists, I would think a jury would have to be advised and have evidence as to all of the facts in the case, not just pass on the plea of guilty entered, because jurors are conscientious. They wouldn't want to say the death penalty should be imposed or should not be imposed unless a full trial was had before a jury. I am not inclined at all to follow that procedure. In what appears to be the present, uncertain state of the law, I am inclined to think—and to relieve your minds of any suspense—that the penalty should not be imposed in your case, nor should a jury be empaneled, but you would be sentenced to a sentence that could be for life imprisonment. I want to be sure that you understand that" (A. 27-28).

"Under all of the circumstances", Mr. LaFollette told Petitioner, "I believe you should plead guilty" (A. 65). Mr. LaFollette "felt very gratified" when Petitioner agreed to change his plea to guilty and that "we saved him from the death penalty in my opinion" (A. 66). This comment upon the influence and advice of the attorneys in 1959 is not in criticism of them. They were competent attorneys and experienced in handling criminal matters (A. 56-57, 63-64). They assessed the evidence against Petitioner, weighed his chances before a jury, and decided that the risk of the death penalty was too great. Therefore, they advised Petitioner to plead guilty. They did not do any-

thing wrong. In the light of the selective death penalty provision in the Federal Kidnaping Act, they knew that they could save Petitioner's life by having him plead guilty, and this is what they recommended. But this is precisely the evil that this Court condemned in *Jackson*. This is exactly the consideration that an accused should not have been forced to weigh. Therefore, simply on the basis of the testimony of the attorneys, the obvious conclusion must be that the fear of the death penalty "needlessly encouraged" Petitioner's guilty plea. The importance of the advice of attorneys in these matters is underlined in *Zachery v. Hale*, 286 F.Supp. 237 (M.D. Ala. 1968).

Petitioner himself stated that he decided to plead guilty because of his "attorney, statements by Alfonso Tafoya, *the great risk of the death sentence.*" (Emphasis added.) (A. 45). He was frank to admit that a number of factors influenced his decision. The district court, after the hearing on the motion to vacate sentence, chose to ignore that evidence and to conclude that the Petitioner pled guilty because of his co-defendant's confession (A. 90). That finding has been commented on earlier, but it should be pointed out here that said finding is not at all inconsistent with the claim that fear of the death penalty influenced the decision to plead guilty. To the contrary, the finding is perfectly consistent with the effect of the selective death penalty provision. Petitioner intended to persist in his plea of not guilty and to have his case tried before a jury until he was apprised by his attorneys of the evidence against him and had learned of his co-defendant's confession. At that point, based upon the advice of his attorneys, the probability of conviction and the risk of the death sentence was a motivating factor in causing Petitioner's guilty plea.

A counter-argument might be made that had Petitioner believed that he was really innocent, and desired to have his case tried without running the risk of a death penalty, he could have pled not guilty and elected to go to trial without a jury. However, such an argument has little merit. In the first place, an accused cannot go to trial without a jury in the absence of consent of the prosecution, and there was never any evidence that the prosecution would have so consented. In fact, the language in the indictment that the kidnap victim was "not liberated unharmed" indicates that the prosecution intended to ask for the death penalty and would not have consented to a trial without a jury. In addition, the district court must agree to hear the case without a jury, and the attorneys both testified that they were convinced that Judge Hatch would not have heard the case without a jury (A. 62, 73). Judge Hatch even said this himself (A. 73).

In conclusion, therefore, based upon the evidence introduced at the hearing on Petitioner's motion, it is clear that the possibility of the Petitioner receiving the death penalty if he went before a jury was uppermost in the minds of everyone involved. That possibility was so important as to induce the attorneys to advise Petitioner to plead guilty. Petitioner himself testified that fear of the death penalty was a reason for pleading guilty. There is absolutely no contradictory evidence of any kind, from any witness, on the role that the death penalty played in the decision to plead guilty. Based upon the law enunciated in *Jackson*, that influence of the death penalty was unconstitutional and improper. It "needlessly encouraged" Petitioner's guilty plea; it "chilled" the exercise of his basic constitutional rights; and, for these reasons, the guilty plea should be vacated.

Conclusion

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the order of the United States District Court for the District of New Mexico, should be reversed, and the case remanded with instructions to grant the Petitioner's motion.

Respectfully submitted,

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